No. 18-18

In The
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The government publicly defends its 40-foot-tall Christian cross monolith even though its officials have expressed relief at the prospect of it crumbling down on its own.

Conceived as a mammoth "Calvary Cross"—symbolic of the crucifixion of Jesus Christ—the cross was constructed on town property in a three-way highway median, which is now the county's busiest intersection. When the cross was first dedicated in 1925 in a ceremony replete with Christian clergy-led prayers and the involvement of local, state, and federal officials, the keynote speaker, a state representative, proclaimed the cross to be "symbolic of Calvary." Virtually every event held at the cross has featured Christian-themed prayers.

In 1985, the government spent $100,000 renovating the cross, followed by an elaborate "Rededication Ceremony," dedicating the cross to veterans of *all* wars. Despite spending an additional $17,000 on routine maintenance, the cross remains in critical condition and even poses a safety hazard. In 2008, the government set aside $100,000 to resuscitate this rapidly deteriorating Christian memorial, but officials recently indicated that it is likely beyond repair. The questions presented are:

1. Did the Fourth Circuit correctly determine that, in light of its size, history, and context, the government's Christian cross—the preeminent symbol of

QUESTIONS PRESENTED—Continued

Christianity—endorses Christianity, not only above all other faiths, but also to their exclusion?

2. Did the Fourth Circuit correctly determine, consistent with every other circuit decision involving a memorial cross, that a government's Christian cross war memorial, towering over a busy highway intersection, gives the impression to reasonable observers that Christian veterans are being honored to the exclusion of all others?

3. Did the Fourth Circuit correctly determine that the government's funding, restoration, monitoring, and ongoing maintenance of an enormous Christian symbol that dominates its surroundings foster excessive entanglement with religion?

LISTINGS OF PARTIES TO PROCEEDINGS

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

Respondent American Humanist Association is a nonprofit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

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JURISDICTION

This case is unripe for this Court's review. No final judgment has been entered. The Fourth Circuit instead left the district court wide latitude on remand to explore "arrangements that would not offend the Constitution." (Pet.App.31a-32a).

INCORPORATION BY REFERENCE

Two petitions were filed seeking review of the same decision, the first filed by the American Legion ("Legion") (17-1717), and the second filed by the Maryland-National Capital Park and Planning Commission ("Commission"). Due to substantial overlap, Respondents incorporate by reference their Brief in Opposition to the Legion's Petition ("Opp."), and attempt to avoid repetition herein.

INTRODUCTION

"'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228 (1982)). This Court has long acknowledged that governmental actions that favor one religion over others "inevitabl[y]" foster "hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). For "nothing does a better job of roiling society" than "when the

government weighs in on one side of religious debate." *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005). This case, unfortunately, bears that out.

The Commission is prominently displaying a massive Christian cross in the center of the busiest intersection in Prince George's County, Maryland (the "Bladensburg Cross" or "Cross").[1] Originally called the "Cavalry Cross" when it was constructed on land owned by the Town of Bladensburg ("Town"), and rededicated by the Commission in 1985 as a war memorial for all veterans, the Commission's Cross discriminates against patriotic soldiers who are not Christian, sending a callous message to non-Christians that Christians are worthy of veneration while they may as well be forgotten. *See County of Allegheny v. ACLU*, 492 U.S. 573, 615 n.61 (1989).

"The cross is of course the preeminent symbol of Christianity." *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring); *see also id.* at 747 (Stevens, J., dissenting) ("We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("the cross is an especially potent sectarian symbol"); *id.* at 792 (Souter, J., concurring) (the cross is "the principal symbol of

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[1] (Pet.App.5a-10a)(J.A.33-34)(J.A.315)(J.A.360-62)(J.A.425)(J.A.579)(J.A.1098)(J.A.1132)(J.A.1584).

Christianity"); *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting in part) (the Latin cross is a "proselytiz[ing]" Christian symbol).

A Christian cross memorial does not commemorate, and necessarily excludes, the "3,500 Jewish soldiers [who] gave their lives for the United States in World War I." *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). *See* H.R. Res. 15, 68th Cong. at 1-6 (1924) (J.A.2280-97). The Jewish War Veterans organization has challenged war memorial crosses for this very reason. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

In the 1924 Congressional debate over grave markers for American Soldiers in Europe, Hon. Emanuel Celler testified: "You have those 1,600 Jewish dead, and if you put something other than the double triangle on their graves, . . . there might arise in the hearts of the mothers and fathers of those boys some conflicting emotions." The Chairman of the Committee on Military Affairs asked, "Why would it not be fitting and proper to have just a nice marble slab, without either the cross or this Star of David or anything else on it?" Mr. Celler responded: "I do not think there would be any objection if everybody would be treated alike."[2]

The Executive Director of the Jewish Welfare Board testified that the cross did not honor Jewish soldiers and that they too would prefer a plain slab to

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[2] (J.A.2282-83).

represent *all* soldiers.[3] He also clarified that there were in excess of 2,500 Jewish war dead, not 1,600, and that many Jewish graves were erroneously, and offensively, marked with crosses.[4]

It is undisputed that the Bladensburg Cross does not honor non-Christian veterans.[5] The Legion admitted that this Cross was never intended to commemorate Jewish soldiers,[6] despite substantial Jewish communities in Maryland and D.C.[7] In 1985, the Commission officially "Rededicated" the Cross to *all* veterans, spending $100,000 on extensive renovations, yet never attempted to make the monument inclusive "so that it appropriately recognized the religious diversity of the American soldiers who gave their lives" in service. *Buono*, 559 U.S. at 726-27 (Alito, J., concurring). On the contrary, the Commission emphasized the Cross's exclusive Christian message by inviting a Catholic priest to deliver prayers at the rededication ceremony.[8]

In addition to disregarding Jewish soldiers, Humanist and atheist military groups, as well as other non-Christian organizations, filed declarations and

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[3] (J.A.2289-90).

[4] (J.A.2289).

[5] (Pet.App.28a)(J.A.213)(J.A.300)(J.A.305)(J.A.1044-46)(J.A.1082-84)(J.A.1437-38)(J.A.2280-97)(J.A.3261)(J.A.3269).

[6] (Oral Arg. 23:05-23:37)(J.A.164)(J.A.771).

[7] (J.A.212).

[8] (J.A.362-65).

amicus briefs contending that the Bladensburg Cross does not represent them or their members.[9]

For instance, the president of the Military Religious Freedom Foundation, which has "clients from all branches of the US military," and represents "a myriad faith and non-faith groups," including "Jewish, Hindu, Sikh, Buddhist, [and] Native American spiritualist," testified that the "Bladensburg Cross does not represent our tens of thousands of MRFF clients."[10]

The Council on American Islamic Relations, the nation's largest Muslim civil rights organization, also submitted a motion opposing the Bladensburg Cross on the grounds that "Christian symbols do not represent Muslim service members."[11]

COUNTERSTATEMENT OF THE CASE

The Commission's statement is neither complete nor accurate. Respondents offer this counterstatement to address its more important omissions and errors.

First, the Commission recites the same bald claim as the Legion, that the "memorial bears the shape of a cross" solely to "evoke the grave markers on the battlefields of Europe." (Pet.5). This is unsupported and indeed *belied* by the record. (Opp.9-11). Again, it is

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[9] (J.A.1044-46)(J.A.1082-84)(J.A.3408-12); *see also* (J.A.3261)(J.A.3269)(4th Cir. Doc. 29-1).

[10] (J.A.1082-83).

[11] (J.A.3411-12).

undisputed that the donors intended to build a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[12] The "Calvary Cross Memorial" committee led fund-raising efforts.[13] The keynote speaker at the Cross's dedication ceremony proclaimed the Cross to be "symbolic of Calvary."[14]

The Commission omits any mention of "Calvary," and of the Cross's famed designer, John Earley, and the Catholic Shrine from which the Cross's design borrowed heavily.[15] This omission is confounding seeing as the Commission was adamant at summary judgment that a reasonable observer would be aware of "Earley's prominence."[16]

Second, the Commission inaccurately contends that it acquired the Cross to "address traffic safety concerns" (Pet.7), neglecting the fact that the government owned the Cross from the outset. The Cross was erected on Town property, with the Town's approval, then taken over by the State Roads Commission for highway expansion, and then transferred to the Commission in 1960 for the sole purpose of "future repair and maintenance."[17] The Commission admitted: "After completing the highway project, the Roads

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[12] (Pet.App.7a)(J.A.1115).

[13] (J.A.1118).

[14] (Pet.App.59a)(J.A.1130-34)(J.A.2508).

[15] (J.A.628)(J.A.2486-87)(J.A.3312-13).

[16] (Doc. 86 at 30).

[17] (Pet.App.7a, 57a-63a)(J.A.78)(J.A.93-94)(J.A.1086)(J.A.1095)(J.A.1393-94)(J.A.1450)(J.A.3219).

Commission determined that there was excess land remaining that was no longer needed at the Memorial."[18]

Third, the Commission states that "[n]o religious ceremony has ever been held" at the Cross. (Pet.15). But the District Court found "evidence supporting [plaintiffs'] assertion that some religious services were held at the Monument." (Pet.App.62a). As the Fourth Circuit noted, "Sunday worship services have at times been held at the Cross." (Pet.App.8a). *See* (J.A.1228).

Moreover, every ceremony held *for* the Cross—including its fundraising drive, dedication, "50th anniversary," and rededication—featured Christian clergy-led prayers.[19] The Commission even invited a Catholic priest to deliver prayers at the Cross's rededication, expressing a desire to "assimilate this relationship again."[20] Since then, the Town and the Legion have co-sponsored annual services at the Cross that regularly include prayers led by Christians.[21]

Lastly, it is undisputed that the Cross is the Town's most prominent monument.[22] The Cross itself has no secular features aside from a small "U.S." star in the center.[23] The Commission stresses that the star

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[18] (Dist. Ct. Doc.86 at 5).

[19] (Pet.App.7a-8a, 23a, 59a)(J.A.362-65)(J.A.1225-32)(J.A.1262-70)(J.A.1350)(J.A.1998)(J.A.2092-96).

[20] (J.A.362).

[21] (Pet.App.8a, 23a, 25a-26a)(J.A.840)(J.A.870-91)(J.A.1282-1343)(J.A.1803-12)(J.A.1847-50).

[22] (Pet.App.24a, 28a)(J.A.37-40)(J.A.1753).

[23] (Pet.App.24a)(J.A.34)(J.A.1098-99).

is the "American Legion" symbol (Pet.6), yet government records refer to it only as a generic "gold star bearing the letters 'U.S.' in red in the center."[24] While "an American flag flies at one side" of the Cross (Pet.6)(J.A.34), neither the star nor the flag negate the Cross's religious meaning, and both only fortify the appearance of government support for this massive Christian symbol. (Pet.App.25a). *See Allegheny*, 492 U.S. at 600; *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) ("the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government").

REASONS FOR DENYING THE WRIT

There are four reasons to deny certiorari. First, the interlocutory posture makes this case unripe for this Court's review. Second, the Fourth Circuit's ruling is highly fact-specific, allows the Commission to retain the historical aspect of the monument, and does not threaten any other monument. Third, there is no Circuit split. Fourth, there is no conflict with this Court's precedents. Sup. Ct. R. 10.

[24] (J.A.61)(J.A.326)(J.A.2991).

I. The case is unripe for this Court's review.

As discussed in Respondents' Opposition to the Legion's Petition, this case is not ripe for this Court's review, as no final judgment has been rendered and it remains unclear precisely what action the government must take on remand. (Opp.13-14). *See Mount Soledad Memorial Association v. Trunk*, 567 U.S. 944, 945-46 (2012) (Alito, J., concurring in the denial of certiorari).

II. The Fourth Circuit's narrow fact-specific decision neither hinders the government's ability to honor its war dead nor threatens any other monument.

A. Modifying the monument to honor all veterans advances religious liberty and equality.

"'The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion.'" *Allegheny*, 492 U.S. at 593 (citation omitted). *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 703 (1994) (recognizing the role of courts in "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion").

The "individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). "When the power, prestige, and financial support of government is placed behind

a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 430-31. *See Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part) (recognizing coercive effect of "the permanent erection of a large Latin cross on the roof of city hall").

Contrary to the Commission's argument (Pet.33), the Fourth Circuit's decision "in no way hinder[s] the county's ability to honor its war dead." *Greater Houston Chapter of American Civil Liberties Union v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985). "Indeed, there are countless ways that we can and should honor them, but without the imprimatur of state-endorsed religion." *Trunk*, 629 F.3d at 1102. Notably, the county already has a secular World War I memorial at the nearby courthouse, unveiled a week after the Cross's groundbreaking, bearing the same names as those on the Cross's plaque. (Opp.10).[25]

More importantly, the "opinion does not presuppose any particular result," as the court remanded "to explore alternative arrangements that would not offend the Constitution." (Pet.App.31a-32a). Justice Alito sanctioned this approach in *Buono*, 559 U.S. at 726-27 (concurring). He noted that "[o]ne possible solution would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave

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[25] (J.A.206-08)(J.A.295)(J.A.1992).

their lives in the First World War." *Id.* Congress chose instead to transfer the land, a curative measure Justice Alito deemed sufficient because "the new owner is under no obligation to preserve the monument's present design." *Id.* at 728.

The Fourth Circuit's decision likewise does not "deprive the community of a historic landmark" (Pet.33), as it leaves intact the historic pedestal containing the plaque, and even the concrete monument, subject to a slight modification that would honor all veterans. The Commission itself suggested that it might be best to start from scratch, *infra*.

After spending $100,000 on renovations in 1985, the Commission spent an additional $17,000 on routine maintenance, which proved futile.[26] In 2008, the Commission set aside $100,000 for substantial modifications because the Cross is "rapidly deteriorating" with large chunks falling off, even posing a safety hazard.[27]

In 2009, the Commission reported: "There are two cracks that are getting worse which potentially will cause a face of the [Bladensburg] Cross to fall off."[28] In 2010, the Commission sought "Requests for Proposals,"

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[26] (Pet.App.8a, 30a, 63a)(J.A.360)(J.A.1108-10)(J.A.1655)(J.A.1672)(J.A.2480)(J.A.2484).

[27] (Pet.App.8a, 30a, 63a)(J.A.562-64)(J.A.1648-50)(J.A.1660)(J.A.1668)(J.A.1672)(J.A.1697)(J.A.1698)(J.A.2158).

[28] (J.A.1655).

but none were within budget.[29] As an official remarked: "There were definitely some challenges with this procurement, so much so, that we ended up cancelling the solicitation."[30]

A 2010 Commission-funded report referred to the Cross as a "public eyesore seen by hundreds of passing motorists each day."[31]

In 2012, a Commission official proclaimed via email: "Wow. Looks like another big chunk fell off it, so it may come down on its own!!"[32]

In November 2013, another official mused: "So, the Peace Cross is falling down. . . . Making repairs to the structure have not proven sustainable or helpful in the long term. At what point does one stop making repairs, and consider whether it *makes more sense to start from scratch* or not . . . ?"[33]

In 2015, the Commission conducted a "crack survey" proving extensive work is urgently needed if the Cross is to survive.[34] The Commission's designee testified in deposition: "As a matter of fact, the Peace Cross is coming down now."[35]

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[29] (J.A.1625)(J.A.1650-56); *see also* (J.A.569-79)(J.A.617) (J.A.637)(J.A.1617-75)(J.A.1704).

[30] (J.A.1675).

[31] (J.A.1574).

[32] (J.A.1668).

[33] (J.A.1672) (emphasis added).

[34] (J.A.1704)(J.A.2480-2502).

[35] (J.A.2158).

The Commission's *internal* conversations reflecting apathy and even relief about the Cross coming down on its own, *supra*,[36] starkly contrast with its *public* statement that the Fourth Circuit's "decision will necessitate an act of shocking disrespect for the brave souls of Prince George's County." (Pet.33). The Commission fails to explain how a slight alteration to this severely imperiled monument—which may come down on its own[37]—will do anything other than respect *all veterans*, the stated intent of the Commission's rededication in 1985.[38]

The Commission's argument also contradicts its theory of the case that the "shape" is somehow incidental or secondary to the memorial. (Pet.i, 2, 5, 17). Of course, this case is about "*the* Christian symbol."[39] As Judge Wynn observed: "If the Latin cross here at issue is more overtly secular than sectarian, as the Commission and *amici* maintain, then their concern that altering or removing the monument would be 'hostile' to religious beliefs is puzzling."[40] The Commission agreed with Judge Wynn that the Cross does not just have "religious content," but is instead "almost universal[ly]" viewed "as a symbol of the crucifixion of Jesus

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[36] *See also* (J.A.1726) (noting disinterest in nominating the Cross for Maryland preservation funding).

[37] The northern arm is "the most deteriorated and damaged section of the Cross," and both arms exhibit "serious cracks" and spalling. (J.A.2490-91)(J.A.2500)(J.A.1574)(J.A.1586-90)(J.A.2052).

[38] (J.A.362)(J.A.1753).

[39] (Oral Arg. 31:05-31:32).

[40] (Pet.App.95a-96a).

Christ."[41] Judge Wynn surmised, "when one characterizes it as simply having religious content, then those who follow that have got to be feeling that cannot possibly be the case. It is much more than a religious content."[42] The Commission's counsel agreed.[43]

B. The government's Christian cross war memorial co-opts spiritual content for military purposes, offending many Christians.

The Fourth Circuit's decision not only advances religious liberty and equality for non-Christians, but also advances religious freedom for Christians, as many Christians believe the cross's sacred status is denigrated when the government co-opts it as a symbol of war.[44] "Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices." *McCreary*, 545 U.S. at 883 (O'Connor, J., concurring).

The cross carries deeply significant meaning for those of the Christian faith and "acts as a 'short cut from mind to mind' for adherents who draw strength from it." *Doe v. Elmbrook School District*, 687 F.3d 840, 852 (7th Cir. 2012) (en banc) (quoting *West Virginia*

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[41] (Oral Arg. 38:55-40:34).

[42] (Oral Arg. 40:00-40:21).

[43] (Oral Arg. 40:21-40:24).

[44] (Pet.App.21a, 89a-93a)(J.A.188)(J.A.1083)(J.A.1443-45) (Oral Arg. 27:25-33:00, 38:00-41:00).

State Board of Education v. Barnette, 319 U.S. 624, 632 (1943)).

The Fourth Circuit correctly observed that the argument that the Latin cross "symbolizes anything other than Christianity may be deemed offensive to Christians." (Pet.App.21a). Judge Wynn believed it would "infringe on intensely personal and sacred questions of religious meaning and belief." (Pet.App.90a). In response to the Legion's statement that a religious symbol "can also acquire secular significance," Judge Wynn admonished: "I would hope you don't water it down too much."[45] He added: "I don't think the cross has secular meaning. That's just a personal aside but I actually think it's kind of offensive to think that saying a cross is just a secular symbol of something else."[46]

Reverend Brian Adams, pastor of Mount Rainier Christian Church, expressed a similar sentiment in 2012 about the Bladensburg Cross:

> [I]t is the symbol of the son of God dying peacefully. . . . I believe that using the cross as a symbol of what our military did is blasphemy, equivalent to taking the Lord's name in vain, using the cross where God and Christ would not want it to be used. The [Bladensburg] Cross is there as a Christian symbol.[47]

See also Pope Francis: The Cross Is the Gate of Salvation, Vatican Radio (Mar. 12, 2017), http://bit.ly/2hysfbS

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[45] (Oral Arg. 31:16-32:00).

[46] (Oral Arg. 31:35-32:25).

[47] (J.A.1443-45).

("The Christian Cross is not something to hang in the house 'to tie the room together' . . . or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.").

In recognition "that a union of government and religion tends to destroy government and to degrade religion," the Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S. at 431-32. James Madison viewed governmental support for religion as "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize."[48] Thomas Jefferson agreed that governmental religious favoritism "tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[49]

C. No other monument is affected by the Fourth Circuit's fact-intensive ruling.

The Fourth Circuit made clear that its "decision is confined to the unique facts at hand." (Pet.App.29a). This Court's precedents indeed require that each

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[48] Letter from James Madison to William Bradford (April 1, 1774), http://bit.ly/2h57Xm5.

[49] Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94-95 (John J. Patrick ed., 1995).

display be "judged in its unique circumstances." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). *See McCreary*, 545 U.S. at 867-68. The Commission's argument that the decision threatens other monuments is therefore unavailing. (Pet.33-35). Like the Legion, the Commission failed to identify a single war memorial cross as prominent, both in terms of size and placement, as the Bladensburg Cross. (Opp.32).

The Fourth Circuit specifically distinguished the crosses in Arlington Cemetery—the Canadian Cross of Sacrifice and the Argonne Cross, and a cross commemorating the Mexican Civil War—(Pet.App.29a), as did the Ninth Circuit in *Trunk*. "None of these crosses is a prominent or predominant feature of the cemetery." 629 F.3d at 1114-15. "All three crosses stand among, if not immediately next to, the countless headstones of soldiers buried in Arlington and alongside a large number of other monuments." *Id.*

"Much the same can be said for the Irish Brigade Monument and the monument to the 142nd Pennsylvania Infantry," which "are on equal footing with [numerous] other monuments and do not dominate the landscape." *Id.* at 1124. As Dr. Piehler testified, in rare cases where crosses "have been used on war memorials built outside of national cemeteries," they usually serve as a "distinctive ethnic marker."[60] The Irish

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[60] (J.A.193).

Brigade Monument, for instance, is a Celtic cross bearing the seal of Ireland and an Irish bloodhound.[51]

The centrality and prominence of the Bladensburg Cross distinguishes it from the foregoing crosses. While the Commission argues that the Cross is situated in a "place for 'commemorating and memorializing veterans,' no less than Arlington," (Pet.34), it also insists that the "Cross is situated on a highway median that 'suggests little or nothing of the sacred.'" (Pet.15). Unlike the crosses at Arlington, there are no walkways to the Bladensburg Cross, and due to its placement within a traffic island of a major three-highway intersection, events held at the Cross necessitate police presence to facilitate pedestrian access.[52]

The Commission also argues that "the notion that *more* religious symbolism would have saved the Cross from invalidity" is "absurd." (Pet.35). The Circuits would disagree. *E.g.*, *Skoros v. City of New York*, 437 F.3d 1, 25 (2d Cir. 2006) ("[W]hen menorahs or stars and crescents are displayed, their religious significance is appropriately neutralized by myriad accompanying symbols of other winter holidays having nonreligious as well as religious origins."). In any event, it would be imprudent for anyone to challenge the Arlington crosses in light of the numerous statements from multiple Circuits indicating that they do not offend the Constitution.

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[51] (J.A.193)(J.A.2254).

[52] (Pet.App.25a)(J.A.37)(J.A.140)(J.A.1155)(J.A.1583)(J.A.1372)(J.A.2485).

The Commission only identifies two other crosses within the Fourth Circuit. (Pet.34). The cross in Towson, Maryland, however, is one-third the size of Bladensburg Cross and does not tower over a busy highway intersection.[53] The small Cape Henry Cross was originally installed in 1607 by English colonists and now stands in a museum-like setting, no larger than the numerous exhibits and monuments in historic Jamestown and Yorktown. *See Trunk*, 629 F.3d at 1115 n.16 (distinguishing Cape Henry Cross).

The Commission goes on to cite Judge Bea's dissent, stating that he gave "hundreds" of *other* examples (Pet.34), but in fact, cited the same Arlington and Gettysburg crosses discussed above, one cross in New Mexico, two in California, the Father Junipero Serra statue (*one* of *one hundred* statues in National Statuary Hall), and lastly, "114 Civil War monuments." *Trunk v. City of San Diego*, 660 F.3d 1091, 1099-100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc). "Only 114" of "3,500 [Civil War] monuments include some kind of cross, however, and the cross is generally 'subordinated to symbols that emphasize American nationalism and sacrifice of the fallen.'" *Trunk*, 629 F.3d at 1113.

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[53] (J.A.2685).

III. There is no Circuit split.

A. The Circuits agree that a Christian cross does not serve as a *secular* symbol of commemoration.

Every federal case involving the constitutionality of a government cross monument displayed as a memorial found the cross unconstitutional, including decisions by the Fourth, Seventh, Ninth, and Tenth Circuits. (Opp.15-19). *See Trunk*, 629 F.3d 1099; *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993); *Gonzales v. North Township Lake County*, 4 F.3d 1412 (7th Cir. 1993); *American Humanist Association v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014); *Jewish War Veterans*, 695 F. Supp. 3; *Eckels*, 589 F. Supp. 222; *see also Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *dismissed on other grounds*, 759 F.3d 639 (7th Cir. 2014) (crosses in veterans park); *Kondrat'yev v. City of Pensacola*, 2017 U.S. Dist. LEXIS 203588, at *21 n.4 (N.D. Fla. June 19, 2017) *appeal pending* No. 17-13025 (11th Cir. 2018) (finding the city's argument that "the Bayview Cross is a war memorial" irrelevant in light of the "numerous appellate and district court cases ordering the removal of war memorial crosses").

Again, there are *thirty* federal cases holding cross displays unconstitutional in a wide range of contexts, including cases by the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, and only *three* outliers.

(Opp.15-20). *See American Atheists, Inc. v. Port Authority*, 760 F.3d 227 (2d Cir. 2014); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008); *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991). And these outliers are attributable to highly unique facts rather than legal disagreement. (Opp.19-20). Yet the Commission relies on these outliers, as well as *Briggs v. Mississippi*, 331 F.3d 499, 503-06 (5th Cir. 2003) (Pet.25-28), which the Legion omitted due to its obvious irrelevance. *Briggs* involved the Confederate flag, not the Latin cross, and did not concern "any religious symbolism." *Id.*

B. The Commission misconstrues the Circuits' decisions to manufacture a split.

1. The Second and Fifth Circuits never ruled on the constitutionality of a war memorial cross.

The Commission's argument that the "circuits have sharply split as to the permissibility of ever using the cross as a commemorative symbol" is meritless. (Pet.22). The Circuits are in complete agreement that a "memorial cross" only "memorializes the death of a *Christian*." *Duncan*, 616 F.3d at 1161, sending "a strong message of endorsement and exclusion." *Trunk*, 629 F.3d at 1124-25. There is no contrary authority. *See also Allegheny*, 492 U.S. at 615 n.61 (noting that a "war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism") (citing *Eckels*, 589 F. Supp. 222). The Commission nonetheless claims a "split" between the "Ninth, Tenth,

and Fourth Circuits," and the "Second and Fifth Circuits." (Pet.28). This "split" is illusory.

The Commission states that in *Port Authority*, the Second Circuit upheld "the commemorative use of the Latin cross." (Pet.28). But the Second Circuit did not say anything about a *commemorative* use of the cross. It ruled that "a reasonable observer would view the primary effect of displaying The Cross at Ground Zero, amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness, not promoting religion." 760 F.3d at 243. The court relied on *Lynch*'s analogy that an "exhibition of literally hundreds of religious paintings in governmentally supported museums" does not endorse religion. 465 U.S. at 683.

The Bladensburg Cross is not a naturally occurring artifact displayed in a museum, but rather, a massive "Calvary Cross," installed in isolation on a traffic island of a busy intersection where the government's imprimatur is unmistakable. (Pet.App.94a).

The Commission then contends that the Fifth Circuit in *Murray* held "that a 'Christian cross' . . . may simply serve to commemorate a municipality's 'unique role and history.'" (Pet.29). What the Fifth Circuit actually held was very different: "Taken as a whole, *the insignia* has the principal or primary effect of identifying city activity and property and promoting Austin's unique role and history." 947 F.2d at 155 (emphasis added). It said nothing about *commemoration*. Moreover, the court deemed it significant that "the cross in Austin's insignia occupies a displacement area of only

.4%-.12%." *Id.* at 157 n.11. This distinguished it from the Seventh and Tenth Circuits' cases finding prominent crosses in seals unconstitutional. *Id.* at 156-57. (Opp.20).

The Commission also downplays the overwhelming authority against it by focusing only on the Fourth, Ninth, and Tenth Circuits' cross cases, while ignoring the Third, Seventh, and Eleventh Circuits' cases finding crosses unconstitutional. *E.g.*, *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (privately-donated cross in state park); *Gonzales*, 4 F.3d 1412 (war memorial); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross in insignia); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (lighted cross as part of holiday display); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (cross on platform funded by the government). In *Harris*, for instance, the Seventh Circuit ruled that the cross "transcend[s] mere commemoration" and promotes only the "Christian faith." 927 F.2d at 1415.

2. The Fourth, Ninth, and Tenth Circuits' decisions do not impose a *per se* prohibition against crosses.

In addition to misrepresenting the Second and Fifth Circuits' decisions, the Commission also misrepresents the Fourth, Ninth, and Tenth Circuits' rulings to forge a "split." It contends that the Ninth Circuit has been applying "a virtual *per se* prohibition on cross-shaped monuments," first citing *Eugene*, 93 F.3d 617.

Although the analysis is short, Judge O'Scannlain evaluated the history, context, and setting of the war memorial cross and still found that it violated the Establishment Clause. *Id.* at 625-26 (concurring). He reasoned that the "City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans." *Id.*

Far from adopting a categorical approach, the Ninth Circuit in *Trunk* understood that "[s]ecular elements, coupled with the history and physical setting of a monument or display, can—but do not always—transform sectarian symbols" into non-endorsing displays. 629 F.3d at 1117. The Ninth Circuit then conducted an extensive analysis, looking to the "fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross at the Memorial's center, the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." *Id.* at 1110 (citing *Van Orden v. Perry*, 545 U.S. 677, 700-02 (2005); *Allegheny*, 492 U.S. at 598-602). Taking all of these factors into account, *id.* at 1105-25, the court concluded that "the Memorial today remains a predominantly religious symbol." *Id.* at 1110.

The Ninth Circuit began its analysis by acknowledging that the "principle that the cross represents Christianity is not an absolute one." *Id.* at 1111. It then devoted *sixteen* paragraphs to the use of crosses in war memorials and found that nothing supported the position that the Latin cross possesses "an

ancillary meaning as a secular or non-sectarian war memorial." *Id.* at 1116.

The court did not stop there: "Our conclusion that the Latin cross is a Christian religious symbol of remembrance or memorialization does not, of course, end the matter." *Id.* at 1117. But when looking to the cross's history, it found that, just as here, the cross has a "long history of religious use and symbolism that is inextricably intertwined with its commemorative message." *Id.* at 1118. (Pet.App.7a-8a, 23a). Turning to the physical setting, the court found that the "Cross physically dominates the site." *Id.* at 1122-23. And its "central position" among later-added secular displays intensified the cross's "sectarian message." *Id.* at 1124.

Inexplicably, the Commission asserts that the "Tenth Circuit has taken a *similarly categorical approach*," citing *Duncan* yet ignoring *Weinbaum*. (Pet.24) (emphasis added). But in *Duncan*, the Tenth Circuit, like the Ninth Circuit, engaged in a highly detailed analysis of the crosses' purpose, context, history, and secularizing features. 616 F.3d at 1159-64. The court recognized that "[c]ontext can determine the permissibility of displays of religious symbols on public property." *Id.* at 1159 (citing *Allegheny*, 492 U.S. at 598; *Weinbaum*, 541 F.3d at 1035). After evaluating their entire context and history, the court concluded that neither "sufficiently diminish[es] the crosses's message of government's endorsement of Christianity." *Id.* at 1164.

The Commission's portrayal of the Fourth Circuit's decision as a categorical approach is equally flawed (Pet.25). Again, the Fourth Circuit employed a detailed fifteen-paragraph analysis consisting of "the entire context and history of the Cross, spanning from its origin to the present," including its context and meaning, factual background and history, appearance, and physical setting. (Pet.App.28a); *see* (Pet.App.18a-29a). (Opp.21-22, 26-32). It found that these "factors collectively weigh in favor of concluding that the Cross endorses Christianity—not only above all other faiths, but also to their exclusion." (Pet.App.28a).

C. The Circuits do not disagree on what knowledge to attribute to the reasonable observer.

Like the Legion, the Commission attempts to manufacture a split by arguing that "the Tenth and the Fourth Circuits understand the reasonable observer as an ordinary 'passerby' who may fail to notice secularizing details that are not plainly visible." (Pet.29). But instead, both Circuits found that the outcome would not be different even if the reasonable observer could read the detailed plaques on the respective cross displays. (Opp.21-22).

The Tenth Circuit in *Duncan* "agree[d] that a reasonable observer would recognize these memorial crosses as symbols of death," but disagreed "that this nullifies their religious sectarian content." 616 F.3d at 1160-61. The Fourth Circuit similarly imputed

knowledge upon the reasonable observer that would be unknown to an "ordinary 'passerby' " including the fact the Cross was originally "dedicated to 49 World War I veterans." (Pet.App.28a) (Opp.22).

More importantly, the Third, Sixth, and Eleventh Circuits—those that the Commission claims are in conflict with the Fourth and Tenth (Pet.29-30)—agree with the Fourth and Tenth Circuits that size, prominence, and visibility are overriding considerations in the reasonable observer analysis. *E.g.*, *King v. Richmond County*, 331 F.3d 1271, 1285 (11th Cir. 2003) ("The caselaw shows that exclusively religious symbols, such as a cross, will almost always render a governmental seal unconstitutional, no matter how small the religious symbol is. . . . Size and placement are, however, factors to consider in the overall effect-prong analysis."); *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 637 (6th Cir. 2005) (upholding Ten Commandments because it was displayed no "more prominently than the other items in the display"); *Adland v. Russ*, 307 F.3d 471, 486 (6th Cir. 2002) (finding display unconstitutional due to "its prominent placement"); *Modrovich v. Allegheny County*, 385 F.3d 397, 408 (3d Cir. 2004) (upholding display because it was "no larger than" the plaque and the text could not be "viewed from across the street"); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 n.11 (10th Cir. 1995) ("the visibility of the cross was significant"); *see also St. Charles*, 794 F.2d at 267 (the cross was "an overpowering feature"); *Gonzales*, 4 F.3d at 1414 (the cross was in a "busy intersection . . . [and] visible to virtually anyone").

D. The Circuits do not disagree on the relevance of longevity and history in cross cases.

The Commission's final "split" argument pertains to *Van Orden*. It maintains that Circuits are divided "as to whether to accord any weight to the factor Justice Breyer deemed 'determinative' in *Van Orden*—that is, that a display has stood for decades without facing legal challenge." (Pet.31).

This argument rests on an incomplete account of Justice Breyer's concurrence. Justice Breyer only considered the lack of legal challenges relevant to a "borderline case." 545 U.S. at 700-03. He deemed the Texas display a "borderline" case because the Ten Commandments have a dual secular meaning tied to our nation's foundation of lawmaking, and that secular meaning predominated when displayed inline with numerous equal-sized, similarly-themed secular monuments. *Id.* And it was not just the absence of any legal challenge, but the fact that the display had not been *used* in a religious manner, there was no religious motive on the part of the private donor, and there was no indication that the delay was "due to a climate of intimidation." *Id.* (Opp.32-35).

To be sure, this Court has not applied Justice Breyer's "borderline case" rationale to any other religious display, let alone to a massive Latin cross that dominates its surroundings. This Court has instead held that "no one acquires a vested or protected right

in violation of the Constitution by long use." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

The Commission declares that the "Ninth and Fourth Circuits have openly rejected this portion of Justice Breyer's controlling concurrence." (Pet.31). Yet the Ninth Circuit in *Card v. City of Everett* upheld a Ten Commandments monument under *Van Orden* relying heavily upon the lack of legal complaints. 520 F.3d 1009, 1021 (9th Cir. 2008).

Both the Ninth Circuit in *Trunk*, and the Fourth Circuit below gave this portion of Justice Breyer's concurrence considerable weight. Both Circuits simply found that, unlike in *Van Orden* and other Ten Commandments cases (Pet.31-32), a climate of intimidation explained the lack of earlier challenges to the respective massive Christian cross war memorials. *See Trunk*, 629 F.3d at 1122 (observing that "La Jolla's anti-Semitic history" explained the "lack of complaint").

The Fourth Circuit accurately observed: "[A] person who dared bring a challenge to the Cross for much of those 90 years would have faced possible rebuke. For example, atheists were forbidden from holding public office [in Maryland] until the Supreme Court's intervention in the 1960's." (Pet.App.23a-24a). It added that the Maryland "constitution still contains the offending provision." (Pet.App.24a).

Dr. Piehler further testified that the Bladensburg Cross was erected in an era and region where the cross was "appropriated by the Ku Klux Klan as a sectarian

symbol designed to intimidate Jews, Roman Catholics, and African Americans."[54] The year the Cross was dedicated, the Klan marched from "the peace cross at Bladensburg to the fiery cross at Lanham."[55] Klansmen also conducted a full "Ku Klux Klan" funeral less than a mile away from the unfinished Cross in 1924.[56] *See generally Virginia v. Black*, 538 U.S. 343, 393 (2003) (Thomas, J., dissenting) (discussing the intimidating nature of cross burnings in neighboring Virginia in the 1920s).

"A number of Klansmen were members of the American Legion during this era."[57] Tellingly, "[n]o rabbi or Jewish leader took part in the dedication of the [Bladensburg] Cross despite the close proximity" to "substantial Jewish communities."[58] "For most Jews, especially observant Jews, it would be surprising if they did not view the Bladensburg Peace Cross as an overtly hostile Christian symbol."[59]

Regrettably, a strong climate of intimidation still persists today, as evidenced by a mere sample of threats and vitriol directed at plaintiffs and their counsel for bringing this case.[60] *See also* Hemant Mehta,

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[54] (J.A.188)(J.A.211-13)(J.A.1241-48).

[55] (J.A.1245)(J.A.212).

[56] (J.A.1242)(J.A.211).

[57] (J.A.212).

[58] (J.A.212).

[59] (J.A.213).

[60] (J.A.1427-30)(J.A.1388-93)(J.A.1404)(J.A.1414). For security reasons, death threats against counsel were reported to the police and not documented on the record.

Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case, PATHEOS (June 21, 2017), https://perma.cc/6KD6-LLYR (discussing threats against Respondents' counsel, Monica L. Miller, in similar cross case).

If anything, the absence of prior lawsuits is evidence that the community perceives the "town's most prominent symbol" (J.A.1753)—a 40-foot-tall Christian cross government-designated war memorial towering over the county's busiest intersection—as the government placing "Christianity above other faiths, views being American and Christian as one in the same, or both." (Pet.App.31a). The risk of "social ostracism can be powerfully deterrent." *Van Orden*, 545 U.S. at 747 (O'Connor, J., dissenting).

IV. The Fourth Circuit reached the correct result in accordance with this Court's precedents.

"The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The "principle of neutrality has provided a good sense of direction" to courts, and a necessary one, because it "responds to one of the major concerns that prompted adoption of the Religion Clauses." *McCreary*, 545 U.S. at 875-76. The Founders "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of

approval." *Engel*, 370 U.S. at 429. They knew "from bitter personal experience," that "whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.* at 431. That same "history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith." *Id.*

To preserve the religious neutrality "clearly manifested in the history and logic of the Establishment Clause," *Larson*, 456 U.S. at 246, this Court has agreed "upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Allegheny*, 492 U.S. at 597. *See Buono*, 559 U.S. at 721 (plurality) (reiterating the importance of "context" and "consequences" in religious display analysis).

This context-driven approach produces consistent results. A potent religious symbol that dominates its surroundings is more likely to impermissibly align the government with religion, *Engel*, 370 U.S. at 429, than religious content integrated into a larger secular display. *Compare McCreary*, 545 U.S. at 881 (Ten Commandments held unconstitutional where it was initially installed on its own and its religious meaning was underscored at dedication ceremony), *Allegheny*, 492 U.S. at 598-99 (crèche in courthouse held unconstitutional because of its centrality and prominence), *and*

Stone v. Graham, 449 U.S. 39, 42 (1980) (Ten Commandments held unconstitutional in public school context), *with Van Orden*, 545 U.S. at 700-02 (Breyer, J., concurring) (6-foot-tall Ten Commandments upheld where it was added to an array of 16 equal-sized monuments and 21 historical markers), *Allegheny*, 492 U.S. at 616-17 (menorah upheld because it was dwarfed by adjacent Christmas tree and not as religiously symbolic as a crèche or cross), *and Lynch*, 465 U.S. at 671 (crèche in private park upheld because it was dominated by secular holiday symbols).

Importantly, in *Allegheny*, Justice Kennedy had no "doubt" that the Establishment "Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." 492 U.S. at 661 (concurring and dissenting in part). He explained that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* (citations omitted).

The Fourth Circuit's decision harmonizes with the foregoing precedents. As the court found, "the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets." (Pet.App.31a). The display "aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the

same, or both." (Pet.App.31a). The Commission failed to show otherwise, *infra*.

A. There is no conflict with *Lynch*.

The Commission relies on *Lynch* for the notion that "passive displays" may "constitutionally employ religious symbols." (Pet.3). This 40-foot-tall Christian cross does not simply "employ religious symbols." It *is a* religious symbol, and *the* Christian symbol.

In *Lynch*, the temporary crèche placed in a private park was *de minimis* in a display that included "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" 465 U.S. at 671. The Court found that, viewed with the rest of the conspicuously commercial display, the inclusion of a small nativity did not "taint" the city's exhibit but merely represented a symbol of a secularized "National Holiday." *Id.* at 681-82, 686.

Conversely, in *Allegheny*, the crèche was featured in a courthouse lobby, somewhat removed from secular holiday symbols exhibited elsewhere in the building. 492 U.S. at 598. The Court held it unconstitutional because "unlike in *Lynch*, nothing in the context . . . detracts from the crèche's religious message." *Id.* By "permitting the 'display of the crèche in this particular physical setting,'" the Court found, "the county sends

an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* at 600. The Court explained: "No viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599.

No reasonable observer could reasonably think that the 40-foot-tall Bladensburg Cross, standing alone in a traffic island, "occupies this location without the support and approval of the government" either. *Id.* This is especially so considering that placing a sign, memorial, or other property within state highway right-of-ways is prohibited by the Maryland State Highway Administration, 23 CFR § 710.403(a).

Additionally, because this monolithic Christian cross is not a small symbol of a secularized holiday, but the *preeminent* symbol of Christianity, and because it is "viewed year-round," the Cross "brings together church and state in a manner that suggests their alliance . . . even more ardently than the unconstitutional crèche display[] in . . . *Allegheny*." *Harris*, 927 F.2d at 1412. *See also Friedman v. Board of County Commissioners*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) ("This [cross] is not like the crèche display upheld in *Lynch*."); *Gonzales*, 4 F.3d at 1423 (the cross was "not seasonally displayed in conjunction with other holiday symbols").

In *St. Charles*, Judge Posner, writing for the Seventh Circuit, distinguished *Lynch*'s crèche from an 18-foot cross bar lit up to form a Latin cross as part of a

city's multifaceted holiday display. 794 F.2d at 270-72. The "cross unmistakably signifies Christianity" whereas the crèche is a "mixed case." *Id.* The court reasoned, "Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians." *Id.* But "the Latin cross has not lost its Christian identity." *Id.* The Tenth Circuit agreed that "[u]nlike Christmas," there is no evidence "that the cross has been widely embraced by non-Christians as a secular symbol of death." *Duncan*, 616 F.3d at 1161-62.

B. There is no conflict with *Buono*.

According to the Commission, the Fourth Circuit's decision "flouts this Court's directive" in "*Buono*" that the "Establishment Clause 'does not require eradication of all religious symbols in the public realm.'" (Pet.12). Again, *Buono* did not make any such "directive." (Opp.36-38). The plurality warned litigants that "this case is ill suited for announcing categorical rules," and the Court was not "making sweeping pronouncements." 559 U.S. at 722.

Of course, merely because this Court stated, in passing, that the Establishment Clause does not require the eradication of *all* religious symbols does not thereby mean, as the Commission contends, that *all* religious symbols are *allowed*. To the contrary, in *Buono*, Justice Kennedy reaffirmed his statement in *Allegheny*: "'[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an

obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.'" 559 U.S. at 715 (quoting 492 U.S. at 661).

And in *Allegheny*, Justice Kennedy cited three cases to support this proposition, *Freidman*, involving a "Latin cross on official county seal," and *Rabun* and *Eugene*, both involving a "cross erected in public park." 492 U.S. at 661 (citing *Friedman*, 781 F.2d 777; *Rabun*, 698 F.2d 1098; *Lowe v. Eugene*, 254 Or. 518 (1969)). In *Buono*, Justice Kennedy contrasted these three examples with the Mojave cross, noting that the "[p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed." 559 U.S. at 715.

Justice Alito agreed that the absence of *government imprimatur* was critical. 559 U.S. at 724-25 (concurring). He explained that "in this part of the country . . . boundaries between Government and private land are often not marked." *Id.* Private citizens "took it upon themselves to place their monument on that spot, *apparently without obtaining approval* from any federal officials, and this use of federal land seems to have gone largely unnoticed for many years, in all likelihood due to the spot's *remote and rugged location*." *Id.* (emphasis added). Justice Alito noted that it would be different if a cross were constructed as "an official World War I memorial on the National Mall." *Id.* at 728.

The Bladensburg Cross was installed on Town property, with the Town's approval and involvement, in

the middle of a highway intersection.[61] Local, state, and federal officials actively participated in the Cross's groundbreaking and dedication ceremonies.[62] Indeed, "major state and county government officials" have been actively involved in nearly every event held at the Cross since its groundbreaking.[63]

And unlike in *Buono*, 559 U.S. at 715, this Cross was emplaced because of its religious meaning. The intent was to build a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[64] The Cross's Christian message was emphasized at its dedication ceremony, both by the keynote address proclaiming it to be "symbolic of Calvary," and by the multiple prayers led by Christian clergy.[65]

The Commission relies heavily on *Buono*, 559 U.S. at 720-21, to support its position that the Bladensburg Cross does not endorse Christianity. (Pet.13). But the plurality was referring to Congress's land transfer statute, and explained that courts "do not inquire into 'reasonable observer' perceptions with respect to objects on private land." *Id.* at 720. The plurality noted that even if the Establishment Clause applied, the

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[61] (Pet.App.7a, 56a-57a)(J.A.78)(J.A.1086)(J.A.1115-18)(J.A.1450)(J.A.1992-94).

[62] (Pet.App.7a, 57a, 59a)(J.A.1120)(J.A.1130-34)(J.A.1222)(J.A.1880)(J.A.1970)(J.A.1991)(J.A.2508).

[63] (J.A.1753)(J.A.137-38)(J.A.356-65)(J.A.383)(J.A.385-420)(J.A.834-40)(J.A.1225-32)(J.A.1266-70)(J.A.2092)(J.A.2095-96)(J.A.1998).

[64] (Pet.App.7a)(J.A.1115-20).

[65] (Pet.App.7a, 59a)(J.A.212)(J.A.1130-34)(J.A.2508).

cross would "be assessed in the context of all relevant factors." *Id.* at 721. One of those overriding factors, not present here, was that "[r]espect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Id.*

The Commission then cites Justice Alito's concurrence to advance its argument that the Latin cross is a "simple marker of *the dead*" and of "*the servicemen*," and that the "shape of the memorial reaffirms that expressly secular meaning." (Pet.14) (emphasis added). Justice Alito, however, did not find that the Latin cross was a marker for *all* servicemen or that it had a secular meaning. Quite the opposite, Justice Alito understood that the cross does *not* reflect "the religious diversity of the American soldiers who gave their lives in the First World War." 559 U.S. at 726-27. He stressed that more "than 3,500 Jewish soldiers gave their lives for the United States," and their graves are marked with a "white Star of David." *Id. See* (J.A.2289-90). Justice Alito simply observed that "a plain unadorned white cross" evoked the "image of the white crosses, row on row" in foreign cemeteries. *Id.* at 725.

Bladensburg Cross is not a "plain unadorned white cross" evoking the image of overseas cemeteries, nor was it intended to. It is a wide, 40-foot-tall, "light brown with a reddish brown border," concrete cross "with decorative bands" to mirror a Catholic Shrine, and was intended to be symbolic of "Calvary."[66] It

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[66] (J.A.1099)(J.A.1134)(J.A.1994)(J.A.1587)(J.A.2486-87).

evokes "a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18. (Pet.App.24a-25a).

In *Duncan*, the Tenth Circuit found that "while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol." 616 F.3d at 1161-62. The Ninth Circuit agreed that the "Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol." *Trunk*, 629 F.3d at 1116. *See* H.R. Res. 15, 68th Cong. at 35 (1924) (J.A.2297) ("a Latin cross for the Christian"). Moreover, the "universal symbol emanating from those foreign wars is *the poppy*, not the cross." *Id.* at 1113 (emphasis added).

As Dr. Piehler testified, "[t]he vast majority of World War I memorials do not make use of religious iconography in their design."[67] Most are secular "statues of doughboys." *Id.* at 1114.[68] "Even during World War I, attempts to use religious iconography were seen as highly controversial."[69] Although overseas cemeteries adopted the Latin Crosses and Stars of David,

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[67] (J.A.190).

[68] (J.A.188-89)(J.A.198-219)(J.A.309).

[69] (J.A.198-206)(J.A.308-309)(J.A.926)(J.A.2280-97).

national cemeteries adopted the inclusive uniform slab marker.[70]

C. There is no conflict with *Van Orden*.

Finally, the Commission cites Justice Breyer's concurrence in *Van Orden* to support its argument that the Cross "serves as a memorial to the fallen rather than an object of religious observance." (Pet.14-15). Again though, Bladensburg Cross has a long history of "religious use and symbolism,"[71] that is "inextricably intertwined with its commemorative message." *Trunk*, 629 F.3d at 1118, 1121. *See also Allegheny*, 492 U.S. at 599. (Opp.4-6, 28-29).

The Commission also avers that twenty years after the Cross was dedicated, "the community began to erect other war memorials around the Peace Cross." (Pet.15). But unlike in *Van Orden*, this 40-foot-tall Christian monolith was proposed and installed in isolation. And it remains "by far the most prominent monument" in the Town, clearly "overshadowing the other monuments" across the road.[72]

Furthermore, the *government* added these smaller displays, not the "community." (Opp.6-7, 11-12, 29). And notably, it did not install any other monument on

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[70] (Pet.App.35a)(J.A.188)(J.A.205)(J.A.305)(J.A.2285).

[71] (Pet.App.7a-8a, 23a, 59a)(J.A.362-65)(J.A.1225-32)(J.A.1267-68) (J.A.1282-1343)(J.A.1350-51)(J.A.1998)(J.A.2092)(J.A.2095-96).

[72] (Pet.App.24a)(J.A.1753).

the central traffic island occupied by the Cross.[73] Thus, a "reasonable observer would find that the [government] had assigned a place of special prominence to the [Cross] in an effort to endorse its religious message." *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 805 n.14 (10th Cir. 2009).

Ultimately, there is no tension between *Van Orden* with its dual-meaning display and the Fourth Circuit's finding that "[w]hile the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." (Pet.App.20a-21a).

[73] (J.A.33)(J.A.37).

CONCLUSION

Because the petition comes to this Court at an interlocutory stage, the case is not ripe for this Court's review. Nor is there any conflict between the Circuits for the Court to resolve, or any conflict with this Court's precedents.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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